IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

ANNA S. A. GRAF and AUGUST GRAF, individually, and said AUGUST GRAF, as Executor of the Estate of George C. Shipman, Deceased, RUTH MARSH, DORIS MARSH, BLANCHE BELLOWS, AMY WILLIAMS KING, T. WRIGHT WILLIAMS and ADELAIDE S. WILLIAMS,

Petitioners,

vs.

CITY OF NEWARK,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinions of the Courts below have been officially printed.

The opinion of the New Jersey Supreme Court was filed on March 16th, 1940, is reported in 124 N. J. L. at page 312 (11 Atl. 2nd 764), and a copy thereof appears at page 7 of the record. The opinion of the New Jersey Court of Errors and Appeals was filed on September 18th, 1942, is reported in 125 N. J. L., at page 96, and a copy thereof appears at page 3 of the record. The Rule for judgment of affirmance and remittitur was entered

on October 15th, 1942 and a copy thereof apears at page 2 of the record. The judgment of affirmance and remittitur allowed by the last mentioned rule has not yet been filed, entered or served.

Jurisdiction.

The Statute conferring authority to review herein is U. S. Code annoted, Title 28, Section 344 (Judicial Code, Section 237 as amended).

Statement of the Case.

A statement of the case has been given in the petition submitted herewith and is, therefore, not repeated here.

Specification of Errors.

The grounds of appeal from the judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals appear at pages 3 to 6 of the record. The errors here relied upon are:

1. Because the Court erred in finding that "the canal property, including the premises in question, was duly conveyed to the State in 1923 by the Canal Company and its lessee, The Lehigh Valley Railroad."
2. Because the Court erred in finding that the respondent, City of Newark, did acquire the land in question herein pursuant to the provisions of law.
3. Because the Court erred in finding that the Charter of the Canal Company did not limit it to use the land in question herein for the purpose of navigation only.

4. Because the Court erred in finding that the conveyance made by Shipman *et als.* to the Canal Company did not convey an estate upon conditional limitation, which terminated upon the abandonment of the canal.

5. Because the Court erred in holding that there was no merit in the contention of the petitioners that the conveyance made by Shipman, *et als.* to the Canal Company conveyed only an estate upon conditional limitation, which terminated upon the abandonment of the canal.

6. Because the Court erred in holding other acts of the Legislature, to wit: those relating to the abandonment of the canal and the disposition of the canal property, are in effect amendments to the Charter of the Canal Company and are in *pari materia* and should be construed together as a whole.

7. Because the Court erred in holding that the abandonment of the canal as such does not raise the presumption that the State relinquished its rights in the property.

8. Because the Court erred in holding that there has been no change in the use of the land.

9. Because the Court erred in holding that there is no reversion of the land to these petitioners.

10. Because the Court erred in holding that the respondent, City of Newark, as successor in title to the Canal Company, acquired a good and valid title to the land in question herein from the State.

11. Because the findings, holdings and decision of the Court are each and all against the weight of the evidence.

12. Because the findings, holdings and decision of the Court are contrary to law.

13. Because the findings, holdings and decision of the Court amount to the taking of the private property and property rights of the petitioners herein for public use without just compensation, contrary to and in violation of Section 16 of Article 1 of the Constitution of the State of New Jersey.

14. Because the findings, holdings and decision of the Court amount to a deprivation of the natural and unalienable rights of these petitioners of "acquiring, possessing and protecting property" secured to them and to all inhabitants of the State of New Jersey under the provisions of Section 1 of Article 1 of the Constitution of the said State.

15. Because the Court erred in finding, holding and deciding that these petitioners were deprived of their vested rights in and to the land mentioned and described in the petition herein by other laws, to wit: those relating to the abandonment of the canal and the disposition of the canal property, which legislative enactments are, in effect, amendments to the Charter of the Canal Company, are *in pari materia* and should be construed together as a whole, for the reason that said legislative enactments amount to the divestment and deprivation of the vested interest and rights of these petitioners in and to the land mentioned and described in the petition herein, secured to them by the provisions of Article V, Section VII, paragraph 3 of the Constitution of the State of New Jersey.

16. Because the findings, holdings and decision of the Court amount to the taking of the property and property rights of these petitioners without due process of law, contrary to and in violation of the

5th and 14th amendments of the Constitution of these United States of America.

17. Because the Court erred in finding, holding and deciding that these relators were deprived of their vested rights in and to the land mentioned and described in the petition herein by other laws, to wit: those relating to the abandonment of the canal and the disposition of the canal property, which legislative enactments are in effect amendments to the Charter of the Canal Company, are *in pari materia* and should be construed together as a whole, for the reason that said legislative enactments amount to the divestment and deprivation of the vested interest and rights of these petitioners in and to said land, contrary to and in violation of the rights secured to them in and by the provisions of Paragraph 1, Section 10 of Article 1 of the Constitution of these United States of America.

18. The Courts below erred in their opinion and judgment in that said Courts decided an important question of law affecting the private property and the vested property rights of these petitioners and others in like circumstances and in like situation, contrary to the rule of the common law, contrary to and in violation of the statutes and precedents, and repugnant to and in violation of the Constitution of the State of New Jersey, repugnant to and violative of the Constitution of the United States of America, and contrary to the decisions of this Honorable Court, thereby creating, by precedent, a law of the State of New Jersey which is invalid for the reason that said law, so created and established:

(a) Amounts to the taking of private property for a public use without just compensation, contrary to and in violation of Section 16 of Article

1 of the Constitution of the State of New Jersey.

(b) Amounts to a deprivation of the natural and inalienable rights of these petitioners of "acquiring, possessing and protecting property" secured to them and to all inhabitants of the State of New Jersey under the provisions of Section 1 of Article 1 of the Constitution of said State.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving these petitioners of their vested property and property rights, contrary to and in violation of the provisions of Article IV, Section VII, Paragraph 3 of the Constitution of the State of New Jersey.

(d) Deprives these petitioners of their property without due process of law contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving these petitioners of their vested property and property rights, contrary to and in violation of Section 10 of Article 1 of the Constitution of these United States of America.

19. The courts below erred in their opinion and judgment in that said courts decided an important question of law affecting the property and vested

property rights of a vast number of people, including these petitioners, to wit: all residents and citizens of the United States of America who have reversionary rights and interests in land, located in the State of New Jersey which have reverted or which will hereafter revert to them under existing contracts in the form of deeds conveying property for a public or semi-public use such as highways, streets, railroads, public buildings, churches, schools, parks, canals, libraries and other specific uses, where such deeds provide that the land shall revert upon the abandonment of such specific use, and thereby created and established, by precedent, a law of the State of New Jersey, which is contrary to the Rule of the common law, contrary to the statutes and precedents of the State of New Jersey, repugnant to and violative of the constitution of the State of New Jersey, repugnant to and violative of the Constitution of these United States of America and contrary to the rulings and decisions of this Honorable Court in that said law, so created and established

(a) Amounts to the taking of private property for a public use without just compensation, contrary to and in violation of Section 16 of Article 1 of the constitution of the State of New Jersey.

(b) Amounts to the deprivation of the natural and inalienable right of all persons in like circumstances with and of like situation to these petitioners of acquiring, possessing and protecting property, secured to them under the provisions of Section 1 of Article 1 of the constitution of the State of New Jersey.

(c) Amounts to the impairment of the obligation of an existing contract, thereby depriving all

those persons of like interest to and in like situation with these petitioners of their property and vested property rights contrary to and in violation of the provisions of Article IV, Section VII, Paragraph 3 of the constitution of the State of New Jersey.

(d) Deprives all of those persons of like interest to and in like situation with these petitioners of their property without due process of law, contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(e) Permits the taking of private property for a public use without just compensation, contrary to and in violation of the fifth and fourteenth amendments of the Constitution of these United States of America.

(f) Impairs the obligation of an existing contract thereby depriving those of like interest to and in like situation with these petitioners of their property and vested property rights, contrary to Section X of Article 1 of the Constitution of these United States of America.

Summary of Argument.

POINT I.

The judgment of the courts below is repugnant to and in violation of the Constitution of these United States of America, contrary to the constitution and laws of the State of New Jersey, the rule of the common law and the decisions of this Court, in that said judgment impairs the obligations of an existing contract, permits the taking of private property for a public use without just compensation and deprives these petitioners and others of their property without due process of law.

POINT II.

The Morris Canal has never been dedicated a public highway and the land here in question could not lawfully be dedicated to such purpose.

POINT III.

The canal property is no longer used for the purposes for which the Morris Canal and Banking Company had power to use the same by the true intent and meaning of its charter.

POINT IV.

The respondent, City of Newark, did not acquire the lands mentioned and described in the petition herein pursuant to the provisions of law.

POINT V.

The Morris Canal is not a public highway devoted to the public use.

Argument.

POINT I.

The judgment of the courts below is repugnant to and in violation of the Constitution of these United States of America, contrary to the constitution and laws of the State of New Jersey, the rule of the common law and the decisions of this Court in that said judgment impairs the obligations of an existing contract, permits the taking of private property for a public use without just compensation and deprives these petitioners and others of their property without due process of law.

In the presentation of this argument in the following manner the petitioners crave the indulgence of the Court for the apparent disregard of the rules of composition and rhetoric in the interest of brevity and conciseness.

Based upon the stipulation of agreed facts and the exhibits therein referred to and thereto annexed as stated and set forth in the record herein (R. 54 to 66), the deed made by Charles T. Shipman and others to the Morris Canal and Banking Company (hereinafter sometimes called "The Canal Company" on January 9th, 1830, was and is a contract because it is

> "an agreement upon sufficient consideration to do or not to do a particular thing". (2 Blackstone Comm. p. 442).

To same effect:

> *Charles River Bridge* v. *Warren Bridge*, 11 Pet. (U. S.) 420; 9 L. ed 773, 938;
> *Sturges* v. *Crowninshield*, 4 Wheat (U. S.) 122, 4 L. ed 529: 2 Kent Comm. 449.

A contract is also defined as:

> "A transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other". Per *Washington J., in Dartmouth College* vs. *Woodward*, 4 Wheat (U. S. 518), 656, 4 L. ed 629.

The contract (R. 55-56) was made and entered into between Shipman and his associates and the Canal Company, and the State of New Jersey was not a party thereto having no interest therein whatsoever. By its terms the grantee took an estate in lands, upon a conditional limitation, to be used for canal purposes only, such estate to terminate when the Canal Company no longer had power to use the lands by the true intent and meaning of the act by which the Canal Company was incorporated (R. 56).

The reciprocal benefits accruing to the parties thereto by the terms of said contract were that the Canal Company thereby took the land for use as a canal so long as it had power to so use it and Shipman and his associates took a vested right in reversion in the said land to commence in possession upon the happening of the event in said contract specified, and such vested rights, in reversion, to the said land immediately, upon the execution and delivery of the said contract, became vested in said Shipman et als, and, upon the death of the said Shipman, said reversionary rights immediately vested in and enured to the benefit of his heirs at law and successors in interest.

In support of this claim, we quote from 16 Cyc. Estates, paragraph 6 Reversions, page 661, where it is said:

> "An estate in reversion is the residue of an estate left in the grantor, to commence in possession after

the determination of some particular estate granted out by him. It is a present vested estate although to take effect in possession and profit in future, and necessarily assumes that the original owner has not parted with his whole estate or interest in the land".

2 Blackstone, Com. 175 quoted in *Alexander* v. *DeKernel*, 5 Ky L. R. 382, 385;
Barber v. *Brundage*, 50 N. Y. App. Div. 123-125; 63 N. Y. Supp. 347;
Powell v. *Dayton, etc. R. R. Co.*, 16 Ore. 33-38, 16 Pacific 863.

A—Reversion is otherwise defined as:

"The return of an estate to the grantor and his heirs after the grant is over".

Booth v. *Terrill*, 16 Ga. 20-25; 4 Kents Comm. 352.

"What remains to the owner of an estate after he has parted with a portion of it, the possession of what thus remains being to return or revert to him upon the termination of the period for which the portion so parted with was to be enjoyed". 2 Washburn Real Property (6th Ed. 496).

"The residue of an estate left in the grantor to commence in possession after the determination of some particular estate".

Todd v. *Jackson*, 26 N. J. L. 525, 540.

B—Creation. A reversion is never created by deed or writing but arises by construction and operation of law and occurs whenever a grantor has conveyed less than his whole interest or estate.

Tinsman v. *Belvidere, Del. R. Co.* 25 N. J. L. 255 and 26 N. J. L. 148;
Beavers v. *Trimmer*, 25 N. J. L. 97.

The petitioners herein are heirs at law of and successors in interest to the said Shipman (R. 23-54) and are vested with the reversionary rights in and to the land mentioned in the said contract to the extent of 13/27th thereof (R. 28-62).

When in the year 1924, the canal was abandoned and closed to navigation by the enactment of Chapter 229 of the laws of 1924, App. 106, the canal, as such, ceased to exist. Its properties were sold in parcels as directed in and by said Chapter 229.

The respondent, City of Newark, acquired the right, title and interest of the Canal Company and of the State of New Jersey in and to the canal property which lies within the limits of the City of Newark (including the land here in question) and uses the land for a subsurface electric railway and a roadway on the surface thereof.

None of the property formerly held by the Canal Company is now used as a canal, and none of such property is now used as a highway of any kind except that part of the said property which is held by the respondent.

All of the things or matters mentioned in the said deed as qualifications, restrictions, or limitations have happened. The grantee, by virtue of said deed, took and occupied the land and used the same for the purposes designated in the deed, viz: for its canal, locks, towing path, toll houses, etc., until the canal was abandoned, by legislative direction, and upon such abandonment the land mentioned in the deed could not be and no longer was used for canal purposes, and thereupon, the purposes for which the land mentioned in the said deed might and should be used ceased to exist; therefore, the purpose for which the Morris Canal and Banking Company had been incorporated, and the purposes for which said land might or could be used, terminated, and the canal having been abandoned, closed to

navigation and dismantled, the grantee was thereby shorn of every vestige of power to use the said lands, by reason whereof time in the lands came to an end, the estate in the grantee terminated and the land reverted *ipso facto*, to the grantor, Charles T. Shipman, his heirs, assigns and successors in interest.

> "It is the general rule that the estate of the grantee continues for so long as he continues to use the property for the purpose specified, and the condition is violated when he ceases such use or abandons the purpose contemplated * * *". (18 C. J. 371, Sec. 406).

In support of this statement, the decision of the Court of Errors and Appeals of New Jersey in the case of *Oxford Board of Trade* v. *Oxford Iron & Steel Company* (81 N. J. L. 694, 80 Atl. 324) is cited. See also *Southard* v. *Central Railroad*, 26 N. J. L. 13, 2 Dutcher 20. *McKelway* v. *Seymour*, 29 N. J. L. 321, 5 Dutcher 328.

In discussing the character of title held by the *Morris Canal and Banking Company, Vice Chancellor Van Fleet in New Jersey Zinc and Iron Co.* v. *Morris Canal and Banking Company*, 44 N. J. Eq. 398 at 404; 15 Atl. 227, says:

> "The defendants under a deed conveying only a qualified fee, would, while their title continued, have the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, for all purposes, as though they held it in fee simple absolute".

A similar question as to the character of title held by the Morris Canal and Banking Company was involved in the case of *State* v. *Brown*, 27 N. J. L. 13, where the Court, at page 20, said:

"By the terms of the conveyance the grantees take a qualified fee, liable to be defeated whenever they cease to use the land for the purpose specified in the grant. 1 Inst. 1, b 27 a; 1 Cruise 79 tit. 1, Sec. 82; 2 Bl. Com. 110."

The conveyance there referred to was to the Canal Company as long as used for a canal, and the Court said:

"There is no reservation in the deed. It conveys all the right, title and interest of the grantors in the lands and its appurtenances for the term specified in the grant, to wit, as long as used for said canal."

In the case of *Oxford Board of Trade* v. *Oxford Iron & Steel Co.*, 81 N. J. L. 694; 80 Atl. 324; the Court of Errors and Appeals said at page 695:

"The trial of the cause turned upon the question of the construction to be given to the condition subsequent contained in the deed, and that, concededly, was a Court question. *Smith* v. *Lunger*, 35 Vroom 539.

"While it is the undoubted rule that conditions of this character, which involve the forfeiture of an estate, are *stricti juris*, and to be construed strictly, they nevertheless must be interpreted in the light of the circumstances surrounding the grant and the clear and reasonable meaning of the language employed by the parties to manifest their intent. *Southard* v. *Central Railroad*, 2 Dutcher 20; *McKelway* v. *Seymour*, 5 Dutcher 328."

In the case of *Freeholders* v. *Buck*, 79 N. J. Eq. 472; 82 Atl. 418, the grant was for the use and purpose of building and erecting thereon public offices for the Clerk and Surrogate of the County of Cumberland. The habendum clause in the said grant was:

"To have and to hold the said lot of land, and the right to use the alley aforesaid, unto the Board of

> Chosen Freeholders of the County of Cumberland aforesaid, and their successors, and to their only proper use, benefit and behoof, so long as the same shall be used for the purposes mentioned and no longer" (p. 474).

Vice Chancellor Leaming writing the opinion points out that it was contended on behalf of the County that the language of the deed in question must be construed as a mere covenant, and as to this contention the learned Vice Chancellor said:

> "I think it is entirely clear that the deed vests in the grantees a determinable fee. *State* v. *Brown*, 27 N. J. L. 13, 20; 4 Kent Com. 10. A determinable estate may arise from and be dependent upon a condition, or it may be an essentially different estate arising from a limitation, the latter estate being sometimes called a conditional limitation" (p. 475).

The learned Vice Chancellor then quoted Washburn on Real Property as follows:

> "Where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition" (p. 476).

In that case the freeholders abandoned the building as offices for the Clerk and Surrogate, whereupon the heirs of the grantor made their claim to the property and the Court concluded as follows:

> "I reach the conclusion that when the County of Cumberland permanently abandoned the use of the lot in question for County offices an absolute title, as to the undivided one-half thereof, vested in the heirs of John Buck, deceased, by reverter" (p. 480).

Inviting the attention of this Court to the conveyance dated January 9th, 1830, made by Charles T. Shipman, and others, to the Morris Canal and Banking Company (R. 55), it will be noted that there are recitals from the statute incorporating the grantee making particular reference to the purpose of constructing a canal or artificial navigation between the Passaic and Delaware Rivers. The grant is of "all the said lands, necessary and proper to be taken and occupied by them for the purposes aforesaid". The habendum clause then reads:

> "To have and to hold the said lands and premises to the said The Morris Canal and Banking Company, their successors and assigns so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said Act."

While the conveyance in the instant case does not in words provide for a reversion to the grantor and his heirs, there does not seem to be any room for doubt that the conveyance creates a limitation in words, the legal effect of which is not distinguishable from that with which the Court concerned itself in the above cited case of *Freeholders* v. *Buck*, 79 N. J. Eq. 472, in which it was said:

> "The period named marks the limitation of the estate as to time; at the end of that period the determinable estate ceased and the fee vests in the grantor or his heirs, by reverter."
>
> "The words 'so long as the same shall be used for the purposes hereinbefore mentioned' are sufficient for the creation of a limitation, the added words 'and no longer' remove all possibility of doubt touching the quality of the estate granted."

Taking the history of the creation of the Morris Canal and Banking Company, its acquisition of property including that acquired from Shipman *et als.*, the construction and operation of the canal and eventual abandonment thereof; it is respectfully urged that the case of *Noble* v. *Oklahoma City*, 297 U. S. 481, 80 L. ed. 816, is as to comparable facts and applicable principles of law substantially identical with the case now before this court.

Briefly the parallel facts in that case are that the railroad company was authorized to acquire a strip of land for a railway and stations; lands were acquired from the owners by deeds or condemnation and with respect to the petitioners before the Supreme Court of the United States, they executed a deed to the railway company containing the following clause:

> "Being intended for the use and occupation of said party (grantee), its successors and assigns as and for its right of way for the constructing, operation and maintenance of its railroad and business at or upon the land hereby released and quit claimed; Provided, that in case of abandonment of said premises by said second party, its successors or assigns for the purposes above mentioned, the same shall revert to the grantors, their heirs or assigns."

Abandonment by the railroad company was by permission of the Interstate Commerce Commission and thereupon the railroad company executed a quit claim deed to the City for the abandoned portion. On proceedings in the United States District Court for the Western District of Oklahoma, there appears to have been an adjudication by that Court that the railroad company's title passed to the city under an Act of Congress of March 8, 1892; but those proceedings are in no way involved in these decisions of *Noble* v. *Oklahoma City* (*supra*) for the reasons

expressed by the Supreme Court that the petitioners were not parties to those proceedings in the United States District Court.

Thereafter the petitioners brought suit in the Courts of Oklahoma and judgments were rendered in favor of the City. On appeal the Supreme Court of Oklahoma affirmed the judgments.

Thereupon the petitioners applied to the United States Supreme Court for a writ of certiorari and that was granted.

The decision of the United States Supreme Court reversed the Courts of Oklahoma and incidentally reversed the United States District Court of the Western District of Oklahoma and remanded the causes to the Supreme Court of Oklahoma "for further proceedings not inconsistent with this opinion"; thereby of necessity invalidating the claim of the City of Oklahoma to title and right of possession in and to the lands in question.

So far as the instant case is concerned, the only question decided by the Supreme Court of the United States was on the controverted point as to whether "the only title the company acquired to its right of way, so far as the tracts in controversy are concerned, was that conveyed by the deeds of the petitioners' ancestors under both of which the title, on abandonment for railroad purposes reverted to their heirs or assigns."

On that point after discussing the facts and the applicable law, the Supreme Court says:

> "It follows from what has been said that the railroad derived title to the Noble lot by the deed of Naoma and George Noble of March 28, 1891. As no question is made but that the reverter clause in that deed became operative upon the abandonment of the line the Noble title is superior to that of the respondent."

The Courts below, however, in total disregard of the rights of these petitioners, have adjudged that:

(a) The canal here in question was a public highway both by express Legislative enactments and also its intrinsic use (R. 7).

(b) The abandonment of one use of a public highway for another consistent use does not work a reversion where the property was conveyed for a public highway (R. 7).

(c) There has been no change in the use of the lands as a public highway and therefore there was no reversion (R. 7).

By passing such judgment the Courts below decided an important question and created, by precedent, a law of the State of New Jersey which is contrary to the rule of the Common Law, contrary to the Statutes and precedents of the State of New Jersey, repugnant to and in violation of the constitution of the State of New Jersey, repugnant to and in violation of the constitution of these United States of America and contrary to the decisions of this Honorable Court in that the said law, so created:

(a) Impairs the obligation of an existing contract thereby divesting these petitioners of their property and vested property rights.

(b) Permits the taking of private property for public use without just compensation.

(c) Deprives these petitioners of their property without due process of law,

because as herein shown the canal is not a public highway either by express Legislative enactment or by its intrinsic use; the Canal Company had only an estate in fee simple defeasible, subject to the limitation expressed in the conveyance (R. 55-56); the canal was abandoned in 1924 by

Legislative authority (Chapter 229 of the Laws of 1924, App. 106); the canal is no longer an artificial navigation connecting the waters of the river Delaware with the tide waters of the Passaic River, and the land in question is no longer used for the purposes for which the Canal Company had power to use the same by the true intent and meaning of its charter; therefore, the land here in question has reverted to these petitioners who are heirs at law of and successors in interest to Charles T. Shipman, the original grantor to the Canal Company.

May it here be further urged that the Courts below, by their decision and judgment in the instant case have created, by precedent, a law of the State of New Jersey which not only effects the rights and remedies of these petitioners in the manner and to the extent above set forth, but such law, so created, likewise seriously affects like rights and remedies of a vast number of citizens and residents of the United States who have or who may hereafter have vested property rights in reversion in lands in the State of New Jersey which had been conveyed by their ancestors for public or semi-public use such as Parks, Schools, Colleges, Churches, Libraries, Highways, Railroads, Canals or Turnpikes, by deeds which, as in the instant case provide for a reversion in the lands upon abandonment or nonuser for the purposes therein specified.

Therefore, it is confidently asserted that the Courts below, in pronouncing the judgment in the instant case, have decided an important question of general law, which judgment and the law thereby created, is contrary to the rule of the Common Law, contrary to the precedents, statutes and the constitution of the State of New Jersey, is repugnant to and in violation of the Constitution of these United States of America and is contrary to the decisions of this Honorable Court.

POINT II.

The Morris Canal has never been dedicated a public highway and the land here in question could not lawfully be dedicated to such purpose.

It has been contended by the respondent, and in fact it has been held by the Courts below, that the Morris Canal has been lawfully dedicated to the public use as a highway, both by Legislative enactment and by usage.

This contention and ruling is erroneous. The Morris Canal has never been dedicated to the public as a highway, either by Legislative enactment or by usage.

In making the above mentioned contention and ruling the respondent and the Courts below apparently place great reliance upon the provisions of the Act by which the Morris Canal and Banking Company was incorporated (P. L. 1824, p. 158, App. 65), and particular reliance for such contention and holding seems to depend upon Section 25 of said Act of incorporation.

The respondent and the Courts below also apparently placed further reliance upon the case of *Barnett* v. *Johnson*, 15 N. J. Eq. 481, decided by the Court of Errors and Appeals in 1856, claiming that the decision in said case is the leading case in New Jersey designating the Morris Canal as a public highway.

To begin with, the above cited case is not in point with the case at bar, the action having been brought by the plaintiff for the purpose of determining his right to light and air, and it did not in any way involve a reversionary title. Much of the dictum in the opinion in said case, which is largely in question and answer form, tends to indicate that like the Legislature of New Jersey, which incorporated the Morris Canal and Banking

Company, the Court believed that the Morris Canal was esteemed to be a public highway, because in this opinion, which was so greatly relied upon in and by the Courts below, the Court in the cited case concludes all of its findings relative to property held by the Morris Canal and Banking Company by the use of the following language, which is found on page 484:

> "The charter vested in the company not merely a right to use it for canal purposes but the entire estate, right, property, and interest in the premises, so long as they shall be used for the purposes of the canal."

Section 25 of the Act incorporating the Morris Canal and Banking Company (P. L. 1824, p. 158, App. 80) reads as follows:

> "25. And be it enacted, that said canal when completed, shall, for ever thereafter, *be esteemed a public highway,* free for the transportation of any goods, commodities or products whatsoever, on payment of the tolls, and conforming to the regulations made or authorized by this Act and it shall be lawful for the Legislature of this State, at any time hereafter, to appoint three commisisoners for the purpose of fixing and regulating the tolls to be taken on said canal; which shall be done by the said commissioners in conjunction with two commissioners to be appointed by the company, unless the company should refuse or neglect upon due notice to appoint any commissioners on their part, in which case the said commissioners on the part of the State or a majority of them, shall fix and regulate tolls with due regard to the interests of the company and of the citizens of this State; provided always, that they shall not have power to reduce said tolls lower than one-half the greatest amount allowed by the 9th section of this Act, without the consent of the president and directors of the said company". (Italics ours.)

By no stretch of the imagination can it be said that the word "esteem" is synonymous with the word "dedicate". Webster's definition of the word "esteem" is as follows:

> "1. To set a value on, whether high or low; to estimate; to value.
>
> 2. To prize; to set a high value on; to regard with reverence, respect or friendship. When our minds are not biased, we always esteem the industrious, the generous, the brave, the virtuous, and the learned.
>
> 3. To hold in opinion; to repute; to think.
>
> 4. To compare in value; to estimate by proportion."

The definition given in Webster's Dictionary of the word "dedicate" is as follows:

> "2. To appropriate solemnly to any person or purpose; to give wholly or chiefly to".

And the synonyms thereto appear to be "consecrated"; "devoted"; "appropriated". But nowhere can be found the word "esteem" as a synonym for the word "dedicate".

Moreover, the word "dedicate" presupposes ownership of complete title.

In 1824 the Morris Canal and Banking Company was incorporated by the Legislature of the State of New Jersey. Neither the State nor its creature, the Morris Canal and Banking Company, was the owner of any property, and the Morris Canal and Banking Company did not become entitled to the use and occupancy of the lands here in question until in January of 1830, six years after the date of the incorporation of the Canal Company and the alleged dedication of the said lands, and the State of New Jersey at the time of the incorpo-

ration of the Canal Company or subsequent thereto had no ownership of the Canal property or of any property used in connection therewith, for which reason the State of New Jersey could not dedicate the canal for any purpose.

The definition of the word "dedication" as found in 18 C. J. page 38, Section 1, is as follows:

> "(Sec. 1) A. Of Common Law Dedication.
>
> 1. In General. Dedication is the appropriation or gift by the owner of land, or of an easement therein, for the use of the public. The doctrine of dedication rests upon public convenience and has been sanctioned by the experience of ages; it is based upon public policy and good faith, in that while securing to the public only such rights as it has honestly enjoyed or learned to depend on, it takes from the landowner nothing that he did not intend to give. * * * Dedication is essentially of the nature of a gift, although distinguishable therefrom, and inures to the benefit of the public as a grant".

The second definition which has been approved by the Court of New Jersey, is found in footnote 1 to the above quoted section, such definition being:

> "An appropriation of land to some public use made by the owner of the fee and accepted for such use by or on behalf of the public. *Hoboken M. E. Church* v. *Hoboken,* 33 N. J. L. 13".

The last quoted definition of "dedication" is concurred in by decisions of the Courts of almost every State of the Union.

Because of the fact that, as heretofore pointed out, at no time had the State of New Jersey owned the property over which the Canal was constructed, it was without authority to make any dedication whatsoever. Nor

could it lawfully make a dedication of a canal property in contemplation that it, the State of New Jersey, would later acquire the property over which the canal was constructed.

Relative to attempts to dedicate property to a public use before such property is owned by the would be dedicator, the remarks in 18 C. J. page 44, Section 17, are enlightening, the language of Section 17 being as follows:

> "(Sec. 17). B. Dedication before acquisition of title. 1. In General. When the dedication is made by one who at the time holds the fee simple to the land no question as to its validity on the ground of title can arise but as a general rule a dedication made before the dedicator acquires his title is not good in the absence of subsequent facts and circumstances constituting an estoppel unless he ratifies it after acquiring title, which of course he may do, or unless he has some kind of equitable title in or equitable grant to the land, this rule differing from the rule in the case of grants in which an after acquired title enures to the grantee by estoppel".

It has been previously pointed out that at no time did the State of New Jersey have any title to the land mentioned and described in the deed here under consideration, and it is equally true that the Morris Canal and Banking Company likewise had no title to said land. Furthermore, it is also true that when in 1923 the State of New Jersey allegedly acquired from the Morris Canal and Banking Company the properties of, and rights, titles, and interests in the Morris Canal, the State could only acquire and did only acquire such title, if any, to such properties as was then owned by the Morris Canal and Banking Company. The State could not possibly acquire any better title in any of the properties of the Morris

Canal and Banking Company than was possessed by that Company, so that the deed made by Shipman and others, containing the provision hereinbefore mentioned, and which conveyed an estate in fee simple defeasible, whatever right in such properties was acquired by the State was so acquired subject to the provisions of said deed of which the State is presumed to have had knowledge, because of the fact that the deed was a public record, filed and recorded in the office of the Register of Deeds of the County of Essex, New Jersey. It was contended by the respondents in the Courts below that the Canal property which was then held by the Morris Canal and Banking Company in trust for the State of New Jersey pursuant to the provisions of Ch. 229 of the Laws of 1924 (1937 R. S. 13:12-13 et seq. App. 106), had been dedicated to the public use as a public highway. This contention is untenable, because as has been previously pointed out dedication presupposes and in fact rests upon ownership of the fee. The State of New Jersey was not the owner of the fee in said lands in 1924 any more than it was the owner of the fee in said lands in 1824, and, therefore, could not dedicate land which it did not own. The only estate acquired by the State of New Jersey when it purchased the Canal properties from the Morris Canal and Banking Company and from its lessee the Lehigh Valley Railroad Company was such right, title or interest in and to any of such lands as was then held, owned and enjoyed by the Morris Canal and Banking Company or its said lessee, and it must be conceded that the State was bound to take notice and inform itself of any conditional limitation contained in any of the deeds to the Canal properties and is bound by such conditional limitations.

Moreover, by a careful study of the provisions of Ch. 229 (P. L. 1924) of the laws of the State of New Jersey (1937 R. S. 13:12-13 et seq. App. 106), it will be readily

found that the Legislature of the State of New Jersey never did and did not intend to dedicate the Canal property to the public use as a public highway.

It will be noted that nothing is mentioned in the title of the act constituting Chapter 229, P. L. 1924, (*supra*) which indicates that one of the purposes of the act is to dedicate the canal property to the public use for highway purposes. It will be further noted by an analysis of Sections 1, 2, 3, 4, 5, and 10, and it will inescapably compel the conclusion that the legislative scheme provided for the abandonment of the canal as a highway and the sale of the company's property with certain specific reservations for objectives inconsistent with highway uses. Such analysis of said sections of said act will show that they provided among other things, for the following:

Sec. 1. Authority and direction to discontinue the use as a means of transportation by water of that portion of the property, the title to which is vested in the said company in trust for the State of New Jersey, and all feeders to the canal. This section then continues as follows:

> "Such portions of such property shall be applied and are hereby dedicated, *subject to the limitations hereinafter provided*, to the public use as public highways for the transportation and passage thereon of persons and property and for any and all other purposes of public highways." (Italics ours.) (App. 107).

It, therefore, appears at the outset that only portions of the canal were dedicated; and even those portions, "subject to the limitations hereinafter provided".

It is a matter of public notoriety and knowledge that up to the time of the passage of this Act, the Morris Canal ran from the Delaware River to the Hudson River. Even by the language of this Act, all that portion of the

Morris Canal east of the west shore of the Hackensack River was excluded from any dedication whatsoever.

Sec. 2. This section dedicates certain waters, water rights, and lands under water to the public use.

Sec. 3. This deals exclusively with the authority to grant to municipalities, under certain conditions, a part of the water supply referred to in Section 2 to be diverted for the development of a municipal water supply.

Section Four. Authorizes and directs the sale of any and all property, the title to which is vested in the company in trust for the State of New Jersey, other than the right and property to be retained for public use as provided for in Section Two of this Act. Thus, by this section the company is authorized to sell all of the property, title to which is vested in the company in trust for the State of New Jersey, except that specified in Section Two. To this is added the provision respecting certain lands located so as to be capable of use in widening certain County roads. It should be noted that thus far by this Section Four all of the property of the Morris Canal and Banking Company, except that specified in Section Two of the act and so much as shall be acquired to widen County roads is not only authorized, but is directed, to be sold without in any way qualifying the purposes for which it shall be used (App. 108).

Section Four proceeds to describe the manner in which municipalities may acquire part of the Canal situated within their respective boundaries, and again excepting the provisions of Section Two. An examination of the authority, direction and privileges contained in the remainder of this Section Four will not only fail to support the argument that the Legislature intended to dedi-

cate this canal property to be limited to public highways, but on the contrary, uncontrovertibly demonstrates that no such limitation was intended because the Legislature, by the language of this Section, left it to the desire of the municipalities, expressed by resolution to set forth, "the purposes to which said municipality intended to devote such property when so acquired." To emphasize this point the section then further provides that, when the municipality shall have purchased such property "for any public use or uses, the property so purchased shall be applied to such public use or uses, or some of them, and such public use or uses shall supersede any other or different public use to which such property may have been theretofore dedicated" (App. 109).

Section Five refers primarily to the limitation as to time and conditions under which municipalities may exercise the rights and privileges set out in Section Four, etc. It then authorizes the company to "transfer the property in the manner hereinafter provided." That is to say: "In the first place" portions of the canal may be offered lying in any other municipality which shall have failed to take the necessary steps to acquire such property and which shall form a single continguous tract capable of the development for the purposes for which said first mentioned municipality shall have acquired its tract. "In the second place" if after a reasonable time after such offer, such municipality shall have failed to avail itself of said offer, then the company after advertisement shall sell any unsold portions of the canal property to the highest bidder deemed by the said Board of Directors to be responsible, at public or private sale. This, with only two provisos, first that said sale shall not be made unless first approved in writing by the Governor of the State, and second, that at any such sale any

municipality through which said canal may pass "may bid for any parcel of said canal so offered for sale" (App. 110).

Reverting to what is claimed by the respondent and the Courts below to be the effect of Section 1 of said Chapter 229, P. L. 1924, to dedicate the canal properties "to the public use as highways" (R. 9-10), the qualifying language "subject to the limitations hereinafter provided," is skillfully avoided in the insistence that the Legislature dedicated this canal as a public highway. The thereafter provided limitation in Section Five conclusively demonstrates that there was no dedication of the "Canal" as a public highway, and thus, because of the legislatively expressed limitations in the act itself which completely negative the intent, if any, to dedicate the Canal. Section Five of the act pertinent to this point reads:

> "Upon any such sale any previous dedication of the property so sold to any public use shall cease and be of no further force and effect and the purchaser shall be entitled to take and hold such property free from any previous dedication to any public use" (App. 111).

Hence, under such a sale the highest bidder would purchase, "free from any previous dedication to any public use."

The contention of the respondent regarding the effect of New Jersey State legislation concerning the Canal upon the property which forms the *locus in quo* must fail, and the judgment of the Courts below is erroneous.

As further evidence of the fact that the Legislature of the State of New Jersey did not intend to, and actually did not, dedicate to any public use the lands mentioned and described in the deed here under consideration, and as further evidence of the fact that the said Legislature

was well informed as to the reversionary rights of the grantors in said deed and others similarly situated, we respectfully invite the attention of the Court to the provisions of Section 3, of Chapter 78 (P. L. 1924) of the laws of the State of New Jersey (2-1924 Supp. C. S. 170; 144 J., App. 104).

It would indeed be a violent presumption that the Legislature had not before it, in the scheme for the abandonment of the canal as described by said Chapter 229, P. L. 1924 (1937 R. S. 13: 12-13 *et seq.*, App. 106), the extent and limitations of the rights and previleges of the Morris Canal and Banking Company, to be transferred to the State of New Jersey, as well also as the question as to what the grantor could grant and the grantee could acquire as property in fee simple absolute. To assume the negative would make meaningless provisions of Chapter 78, P. L. 1924 (2-1924 Supp. 17); 144h to J *et seq.* (App. 103), which provides, *inter alia,* for the purchase, by municipalities, of the right, title and interest in and to such property, the title to which is now vested in the Morris Canal and Banking Company in trust for the State of New Jersey; *and empowers the purchasing municipality to "acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased,"* and Section 10 of Chapter 229, P. L. 1924 (1937 R. S. 13:12-25, App. 113) (under the provisions of which chapter, the Morris Canal and Banking Company, as such trustee, sold its right, title and interest in and to canal property), which provides, *inter alia* "any instrument of conveyance executed by the Morris Canal and Banking Company, pursuant to any of the provisions of this act, *shall operate to convey all the right, title and interest of the said company and of the State of New Jersey*" (Italics ours). If the company or the State had a fee simple absolute, is it not reasonable to assume that the Statute would have provided for the

conveyance of the property and not the right, title and interest therein?

Thus the power to convey after abandonment "the right, title and interest" of the Morris Canal and Banking Company, trustee for the State of New Jersey to the respondent, City of Newark, conveyed no more than the Morris Canal and Banking Company could have conveyed if it had abandoned the canal without legislative assent. Upon abandonment, the period of limitation set out in the Shipman conveyance had expired and the reverter became effective by force of law; so that a conveyance by the corporation, as trustee or otherwise, of the right, title and interest could not create a new estate in the grantee because that would be tantamount to an attempted conveyance by the Legislature of property which neither it as a representative of the people nor the State of New Jersey own.

Hence the lands conveyed by Shipman and others to the Morris Canal and Banking Company mentioned and described in the deed here under consideration, reverted to the said Shipman, his heirs and successors in interest by operation of law when the said lands ceased to be used for a canal.

POINT III.

The canal property is no longer used for the purposes for which the Morris Canal and Banking Company had power to use the same by the true intent and meaning of its charter.

The deed made by Shipman and others to the Morris Canal and Banking Company, after reciting that, under the act incorporating the company, "the Morris Canal and Banking Company are authorized to construct and make

a canal or artificial navigation to connect the waters of the Delaware River near Easton with the tide waters of the Passaic, and to take, occupy, possess and enjoy all such lands as may be necessary and proper to be taken and occupied by them for the said canal and its necessary locks, towing paths, toll houses, offices, works and devices", proceeds to convey the premises in question by a deed containing the following habendum clause: "To have and to hold the said lands and premises to the said, the Morris Canal and Banking Company, their successors and assigns, so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said Act" (R. 55-56).

What these purposes were is set forth very clearly in the Act. The title of the Act itself describes it as "An Act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers". In order to dispel all doubt or misconception as to the intent of the legislators to confine the operation of the canal property to one purpose and one purpose only, Section 27 of the Act provides specifically for the manner in which the Act should be construed. It should be so construed, said the Legislature, that (App. 81):

1. The corporation "shall not be authorized to take or appropriate to the use of the said canal or under color or pretense that the same are necessary therefor, any lands, waters or streams of water, but such only as are actually necessary for the erection and use of the said canal for the purposes of navigation only".

2. The corporation shall not be authorized to sell any lands or waters "taken or acquired for the use of said canal as aforesaid", with certain exceptions.

3. The corporation or any other person shall not be authorized to use or appropriate any part of the waters for "mills or any other purpose than the mere navigation of said canal".

So in the Act itself, we find a definite object clearly expressed, and fortified by the determination of the legislators to avoid all possibility of mis-construction by setting forth clearly and unequivocally their intent to confine the operation of the property to be acquired by the Morris Canal and Banking Company to "the purposes of navigation only".

It is obvious that, when the grantors in the Shipman deed to the Canal Company conveyed the property by a deed with a habendum clause granting the company the right to have and to hold the premises "so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of said Act", the limitation imposed upon the estate granted by the deed was clear. The "purposes" referred to related wholly to the navigation of the canal. So long as the property was used for navigation purposes, title was to vest in the grantee. If the canal should at any time be abandoned so that navigation should cease, then title was to revert to the original grantors or their heirs and survivors in interest.

That it is conceded by the respondent that the canal was abandoned appears from the statement of facts (R. 59).

In 1922 an act was passed (R. 57-5) authorizing the acquisition of the canal by the State. The following year all the canal property, including all of the right, title and interest of the Morris Canal and Banking Company in and to the premises in question, was conveyed by the Morris Canal and Banking Company and by its lessee, the

Lehigh Valley Railroad Company, to the State of New Jersey (R. 58). By an Act passed the following year (L. 1924, Ch. 78, p. 151, App. 103), it was provided that upon the abandonment by lawful authority of navigation upon the Morris Canal, the City within which any canal property is located might acquire for public use such parts of the canal property as might be located within its boundaries (R. 58-59). Then followed legislative direction to discontinue transportation by water and to drain the canal (R. 59); after which there followed the conveyance to the City of Newark of all of the right, title and interest of the Morris Canal and Banking Company in and to the canal property within its borders, including the premises in question, and the construction of an electric railway upon certain lands, including the property that the ancestor of relators had originally conveyed to the canal company to be held by it so long as the said Morris Canal and Banking Company shall have power to use the same by the true intent and meaning of its act of incorporation. And it is conceded by the respondents that the property formerly occupied and used as the Morris Canal is no longer used for navigation purposes only, but is used for a street railway and for vehicular traffic on the surface thereof (R. 59).

POINT IV.

The respondent, City of Newark, did not acquire the lands mentioned and described in the petition herein pursuant to the provisions of law.

The claim of the respondent herein and the opinion of the Courts below appear to rest the acquisition of the property in question by the City of Newark upon its authority of Ch. 78, P. L. 1924, (App. 103). It must

be assumed that counsel are thereby asserting that that Chapter is authority for the conveyance by the Canal Company as trustee for the State of New Jersey of parts of what the Legislature in 1824 "esteemed" the canal, when completed, to be a public highway, and that the subsequent Legislature by the enactment of Ch. 229, P. L. 1924, (App. 106), in Section 1, dedicated the said canal to the public use as public highways. If the respondent, the City of Newark, and the Courts below, rest the character of the title upon the provisions of Ch. 78, P. L. 1924, *supra*, it will become immediately apparent that this Act enabling cities, etc., to acquire portions of the canal property upon the abandonment of navigation upon the Morris Canal contains no such limitation or restriction as is argued for the respondent in support of its contention that the Morris Canal was established as a public highway and continued to be such regardless of the abandonment of navigation on the said canal.

This is confidently asserted to be an inescapable conclusion from the very language of Section 1 of this Act (Chapter 78) wherein the power and authority is given to municipalities "to acquire for public use, such parts of said canal property as may be located within its boundaries", and very expressly negativing any inference that the Legislature intended such acquisition to be limited to use as public highways. This section provided that a municipality might adopt a resolution expressing its desire to acquire such portion of the canal property and setting forth the purpose for which it is intended to devote such property when acquired.

The second section of said Chapter 78 further demonstrates that it was the legislative intent to have the canal property disposed of to a municipality in which the canal property does not lie in the event that the municipality in which the canal does lie has failed or refused to acquire

it under Section 1. And the only limitation upon the use of the canal property in such event is that it shall form a single tract contiguous with the canal property lying within the municipality seeking to acquire it, and is capable of development "for the purpose for which said municipality intends to acquire the canal property within its borders".

Aside from the unequivocal language of the statute hereinabove referred to, it becomes manifest upon reading the provisions of Section 3 of the Act that the Legislature did not intend to make a dedication of the canal property as a public highway or for any public use in disregard of reversionary and other private rights in the property so purchased by municipalities. For the convenience of the Court, Section 3 of said Chapter 78 of the Laws of 1924 is here quoted as follows:

> "3. Any municipality, county or counties which shall purchase any such property may acquire by gift, purchase or condemnation any reversionary and any other private rights in the property so purchased * * *".

The Legislature of 1924 as well as its predecessors had before them the official report of the committee acting under legislative authority and appointed by the Governor showing that the Morris Canal and Banking Company was occupying lands to which it had only base or qualified fee with reversion to the grantors upon abandonment of navigation (R. 63).

Unless that be assumed without the necessity at this time of proof of public records in this State, the inclusion of the provision in Section 3 of this statute providing for condemnation proceedings to acquire reversionary and other private rights, would amount to an absurdity.

In passing it may be properly suggested with respect to the attempt in that section to limit the value of such private rights to the subject to a use to become non-existent as that former use shall have compared with the new public use for which the same shall be taken by a municipality was beyond the power of the Legislature, and it is elementary that just compensation for the taking of private property for public use could not be constitutionally arrived at in any such manner; and the Legislature seems to have been at least apprehensive of that danger in providing as it did in the remainder of said Section 3 as follows (App. 104):

> "* * * and in all such cases of condemnation the value to be paid to the owner of such reversionary or other private rights shall be the value of such rights subject to the continued use of the property for canal purposes together with the damage, if any, arising out of the change from the use for canal purposes to the public use for which the same shall have been taken by such municipality. If in any such case of condemnation it shall be determined that the rule of valuation in the act prescribed invades the constitutional right of compensation of any private owner, the measure of compensation shall be modified accordingly and the residue of this act shall not fail."

What has heretofore been said concerning Chapter 229, P. L. 1924 (App. 106), further emphasizes the intention of the legislature as expressed in Chapter 78 (*supra*), because the legislative authority under Section 10 to convey any or all of the canal property limits the Morris Canal and Banking Company as trustee for the State of New Jersey to conveying only the right, title and interest which such trustee has.

Chapter 78 having become effective before Chapter 229, it must further be presumed that the same legisla-

ture had in mind the reversionary and other private rights in these canal propeties when it so limited the trustee in the matter of conveyance.

Therefore, the respondent, City of Newark, did not acquire the land mentioned and described in the petition herein pursuant to the provisions of law.

POINT V.

The Morris Canal is not a public highway devoted to the public use.

It has been heretofore shown that the Morris Canal properties have never been lawfully dedicated as a highway for the public use. In an attempt by the respondent and the Courts below to make some kind of a showing to the contrary, they seem to place reliance upon a number of cases (R. 9-10), none of which are in point and all of which deal with subjects entirely unrelated to the matter at Bar, in that none of such cited and relied upon cases deal with lands the title to which was held as an estate in fee simple defeasible, as is the case here, but to the contrary all of such cited and relied upon cases deal with lands taken by condemnation or with lands which had been acquired by the canal company upon the payment of full value therefor or concerning the right of an adjoining tenant to light and air. The respondent and the Courts below seem most strongly to rely upon the case of *Barnett* v. *Johnson,* 15 N. J. Eq. 481, decided by the Court of Errors and Appeals in 1856. At the time of the writing of the opinion in this case and as stated therein it is true that the Morris Canal was then in full operation as a highway, and that it was by Section 25 of the Charter of the Canal Company esteemed to be such public highway free for the transportation of goods and com-

modities upon the payment of tolls, and it is conceded by the petitioners that so long as the Morris Canal remained in full operation it had complete dominion over the lands mentioned in the deed made by Shipman and others to the Morris Canal and Banking Company (R. 55-56), but that when the canal was abandoned the land mentioned and described in said deed by the terms thereof and by operation of law reverted to the grantor, his heirs, and successors in interest.

During the time in which the Canal was operated and while it continued in such operation it was, as stated in Section 25 of the Act incorporating the Morris Canal and Banking Company (P. L. 1824, p. 151), esteemed to be a public highway (App. 80).

It has been heretofore pointed out that there is a vast difference in the meaning of the words "esteem" and "dedicate."

In making this enactment the legislature merely evidenced an intent to control the company which operated the canal so as to prevent discrimination between those who used the same.

It should be borne in mind that the Morris Canal and Banking Company was a private corporation and was not connected or associated with the State by any lawful ties other than that the Morris Canal and Banking Company was the creature of the State endowed with a franchise to operate a public convenience, and is not to be compared in any sense with the Highway Department of the State which operates highways for the public use, because the said highway commission or department has been declared by the laws of this State to be the *alter ego* of the State of New Jersey for the purpose of maintaining highways for the public use. But the highway maintained by the Morris Canal and Banking Company was not a public highway in the sense that highways maintained by the State or by its *alter ego* are such.

In the matter of *Pittsburgh & Lake Erie Railroad Company* v. *Bruce*, 102 Penn State Rep., 23, a canal company was chartered by the State and the canal was declared by legislative act to be a public highway whereon any one might travel on payment of tolls. The canal company, having become insolvent, all of its property and franchises were sold to a railroad company by order of Court. It was held that the railroad company could not construct its tracks on the right of way acquired by the canal company without making compensation to the owner of the land. In that case the Court said (p. 34):

> "But it is urged that, by the Act of the Legislature the Pennsylvania and Ohio canal was made a public highway, and that therefore the State had the undoubted right to grant the use of that highway to the present corporation, and that without compensation to anyone. But this proposition is founded on a premise that will not bear scrutiny. In the first place, this public highway belonged to a private corporation, and it was public only in this, that the public had the right to use it by paying the tolls which the company might see fit to charge. It was a public highway in the sense that a tavern is a public house. Anyone may float a boat over the one under the same conditions that he may stop at and demand entertainment in the other, that is by paying the proper charges. Thus, whilst the canal company held its franchise subject to a qualified right, yet its navigable way was its own property, and was by no means like a common lot or street over which the commonwealth has the exclusive control and which it may devote to corporate uses."

Reverting for the moment to the case of *Barnett* v. *Johnson*, above cited, we find the following pertinent language of this Court at page 484:

> "The charter vested in the company not merely a

> right to use it for canal purposes, but the entire estate, right, property and interest in the premises, *so long as they shall be used for the purposes of the canal.*" (Italics ours.)

It is indeed difficult to reason out why distinguished counsel for the respondent and why the Courts below should cite the case of *Strock* v. *East Orange*, 80 N. J. L. 619, 37 Atl. 105) as authority for what the City of Newark claims as a right to occupy and hold the lands of the ancestor of these petitioners. Mr. Justice Parker, speaking for the Supreme Court in that case said, *inter alia*, at page 624:

> "We think it is true that after the land is dedicated to public use for certain purposes, it is not within the power of the municipality to divert such land to other purposes without first exercising the right of eminent domain and paying to the owner of the fee a proper compensation therefor. But when the land has been acquired for public use, as for a park, by condemnation and payment to the owner of full value or by sale and purchase, it seems to be competent for the Legislature to authorize it to use it for other purposes. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 235".

So, likewise, as to the case of *Carroll* v. *Newark*, 108, N. J. L. 323, 158 Atl. 458). There the Court of Errors and Appeals is dealing with land acquired by the City of Newark by condemnation under the legislative authority and paying "the full price of the land", intending to and taking title in fee. Under these circumstances the Court of Errors and Appeals said that having thus acquired the fee under authority of eminent domain for one public purpose, the municipality was not precluded from utilizing such land for another public purpose.

In neither of the above cited cases was the question before the Courts as to the right of a vendee acquiring the

right, title and interest of the vendor as trustee, either to change the utility of private property or to take private property to public use without paying just compensation. There is no controversy between counsel respectively as to what the case of *Frelinghuysen* v. *State Highway Commission*, 108 N. J. L. 403, 158 Atl. 465 has decided; if counsel for the respondent limits himself to what the Court there decided respecting the character of the title acquired by the State under condemnation proceedings. What the Court said on that point is as follows:

> "When the State takes the property of its citizens for highway purposes, it acquires an easement only and it would seem that it is empowered to take only so much of the title as is essential to the public use authorized".

Mr. Justice Lloyd speaking for the Supreme Court in that case made this interesting observation (107 N. J. L. 222, 152 Atl. 79):

> "Public uses are constantly changing and particularly with regard to the lands occupied by our highways; the course or direction of the highways are frequently altered and upon the abandonment of such lands for such use, unless the State holds a greater title by the voluntary act of the owner, the easement ceases and the State has no further interest".

May the attention of the Court be called to the fact that by reference to the affirmance by the Court of Errors and Appeals, this case was affirmed for the reasons expressed in the opinion delivered by Mr. Justice Lloyd in the Supreme Court.

Referring to the opinion of Vice Chancellor Backes in *Gill* v. *Ferrone* (unreported), a reading of that opinion demonstrates that the learned Vice Chancellor was not dealing with a base or qualified fee, but that the land was acquired by condemnation which presupposes that just compensation had been paid. In further considering that

opinion it should be observed that the only issue before the Vice Chancellor was the common law right of light and air; and what is said in the opinion concerning Chapter 229, P. L. 1924, App. 106, is dictum.

In support of the claim made by these petitioners that the lands mentioned in the petition herein reverted to them as heirs and successors in interest of Charles T. Shipman by operation of law when the lands ceased to be used for a canal, we beg leave to cite *Noble* v. *Oklahoma City,* 297 U. S. 481, 80 L. Ed. 816; *Cornelius* v. *Ivins,* 26 N. J. L. 376; *United States Pipe Line Co.* v. *Delaware, etc. R. R. Co.,* 62 N. J. L. 254 at 267; 41 Atl. 759; *Farnum* v. *Loomis,* 2 Ore. 29, 32; *Freidman* v. *Steiner,* 107 Ill. 125-131; *Ernst* v. *Little River Land Co.,* 109 Tenn. 427, 535; *State* v. *Alter,* 80 Neb. 405, 407; 114 N. W. 293; *New Cathedral Cemetery* v. *Browning,* 138 Atl. (Md.) 258 at 260; *N. J. Zinc & Iron Company* v. *Morris Canal and Banking Company,* 44 N. J. Eq. 398 at 404, 15 Atl. 227; *State* v. *Brown,* 27 N. J. L. 13; *Oxford Board of Trade* v. *Oxford Iron & Steel Co.,* 81 N. J. L. 694, 80 Atl. 324; *Bouvier* v. *Baltimore & N. Y. Ry. Co.,* 67 N. J. L. 281, 51 Atl. 783; *Carr* v. *Banghart,* 112 N. J. L. 324, 170 Atl. 620; *Freeholders* v. *Buck,* 79 N. J. Eq. 472, 81 Atl. 418.

The petitioners respectfully urge that neither they nor their ancestor had or could have had any dominion over the lands conveyed to the Canal Company so long as they continued to be used for canal purposes; but it is equally certain that instantly upon the cessation of that use the period of limitation in the conveyance set forth had arrived and title reverted to the grantor and to his heirs and successors in interest.

Such property as the Canal Company had, unencumbered by limitations or by conditions subsequent, it could and did sell to the State of New Jersey, but it cannot be controverted that the Canal Company could not sell to the State of New Jersey nor hold as trustee for the State

of New Jersey any greater quantum of title than it possessed.

The petitioners have hereinbefore referred to, and in the record have set out at length, the deed which forms the basis of their contention that the property mentioned in said deed reverted to them by operation of law upon the abandonment of the canal. We take the liberty of again here pointing out that the said deed restricts the use of the lands thereby conveyed and limits the time in the lands by the wording of the habendum clause which reads as follows:

> "To have and to hold the said lands and premises to the said, The Morris Canal and Banking Company, their successors and assigns, *so long as the same shall be used for the purposes for which the Morris Canal and Banking Company have power to use the same by the true intent and meaning of the said Act.*" (Italics ours.)

The words in the above quoted habendum clause "the said Act" unquestionably and uncontrovertedly refer to the Act by which the canal company was incorporated (P. L. 1824, p. 158, App. 65). Thus, the land granted was restricted as to the use thereof to the only one purpose for which the canal company was authorized to take and use the land, that is, for the use of the canal. By reference to 9 C. J., page 1128, third paragraph of Section 8, we find the following:

> "Restriction on use of lands. The fee simple may be limited to the use or purpose of navigation and when so restricted the company cannot use the property for other purposes." *Bostock* v. *North Staffordshire R. Co.*, 4 E and B 798; 82 E. C. L. 798; 119 Reprint 295; *Badger* v. *South Yorkshire R., etc., Co.*, 1 E and E 347; 102 E. C. L. 347; 120 Reprint 939.

The estate in said land having been created with re-

liance upon the 1824 statute above referred to, the heirs or successors in interest of the grantor cannot now be required to part with their property nor may they be deprived thereof by amendments to said law or by supplements thereto, or by any new statute enacted subsequent to the making of the said deed, and are therefore not bound by the provisions of the statutes enacted in 1922, 1923 and 1924. The land reverted to the heirs and successors in interest of the grantor thereof upon the abandonment of the canal, and neither the canal company nor the State of New Jersey has any right, power or authority to deprive these petitioners of their property without just compensation.

Another condition which exists relative to the Morris Canal which should conclusively demonstate that the Morris Canal regardless of what its status may have been prior to the enactment of Chap. 229, P. L. 1924 (1937 R. S. 13:12-13, App. 106), it certainly cannot by any stretch of the imagination now be or be considered as a public highway because it is not only a matter of fact, but it is also recognized by law that a highway to maintain its status as such must remain and continue to be one continuous strip of land connecting two designated points.

It was ordained by the Legislature of the State of New Jersey when the Morris Canal was incorporated, and by the Act of incorporation, that the Morris Canal should be a continuous navigable strip connecting the waters of the Delaware river at Easton with the tide waters of the Passaic river.

Since the abandonment of the canal by legislative authority in 1924, and in accordance with such legislative authority, the said canal has been dismantled and closed to navigation, and only that portion of the canal which lies within the boundaries of the City of Newark is now used for highway purposes. The remainder of the canal properties have been sold off to various munici-

palities for various purposes, and those portions sold to municipalities and others, aside from that property, the right, title and interest to which was sold to the City of Newark, are not used for highway purposes.

It is, therefore, contended by the petitioners that the canal as a highway no longer exists, and that it ceased to exist by legislative authority, whereupon the land mentioned and described in the deed here under consideration reverted to the heirs and successors in interest of the grantor Charles T. Shipman.

CONCLUSION.

For the reasons heretofore stated and for the protection of the property and vested property rights of these petitioners and all other persons in like situation and in like circumstances, it is respectfully submitted, that the Writ of Certiorari should issue as prayed for in the petition and the judgment of the courts below should be vacated and set aside, and that these petitioners should be granted such other and further relief as justice may require.

Respectfully submitted,

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